Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-613

LINDA RUTLEDGE, et al,

Petitioners,

v.

LOWELL LONG, PERSONNEL DIRECTOR FOR THE STATE DEPARTMENT OF ADMINISTRATION, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

LOWELL LONG, PERSONNEL DIRECTOR FOR THE STATE DEPARTMENT OF ADMINISTRATION,

HENRY SCHWALLER, SECRETARY OF STATE DEPARTMENT OF ADMINISTRATION,

ROBERT HARDER, SECRETARY OF STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,

W. VAN ALEXANDER, PERSONNEL CHIEF, STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, and

MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

The Petitioners pray that a Writ of Certiorari issue to revise the opinion and judgment of the Court of Appeals of the State of Kansas rendered in these proceedings on May 26, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Kansas is unreported, as it was not designated for publication, and that opinion appears at Appendix A, infra, at 23-27. The opinion of the District Court of Shawnee County, Kansas, was not reported and appears at Appendix B, infra, at 28-40.

JURISDICTION

The opinion of the Court of Appeals of the State of Kansas was rendered on May 26, 1978, and on June 22, 1978, that court denied a timely Petition for Rehearing and/or Modification. A copy of that Order appears at Appendix C, infra, at 41. On July 13, 1978, the Supreme Court of the State of Kansas denied a timely Petition for Review and the Order of the Supreme Court is set out at Appendix D, infra, at 42. Thus, the Court of Appeals of the State of Kansas was the highest court of a state in which a decision could be had. Nash v. Florida Industrial Commission, 389 U.S. 235, 237 (1967); Michigan-Wisconsin Pipe Line Co., v. Calvert, 347 U.S. 157, 160 (1954), rehearing denied, 347 U.S. 931 (1954). See also Rule 8.03(b) of the Rules of the Supreme Court of the State of Kansas, Appendix E, infra, at 43.

Federal questions were raised in the courts below as indicated infra at 10-12.

The excerpts from the record showing the raising of these federal questions are set out in Appendix F, infra, at 44-49.

The jurisdiction of this court is invoked under 28 U.S.C.A. Sec. 1257(3)(1966).

FEDERAL STATUTES AND REGULATIONS INVOLVED

Because of the number and length of the federal statutes and regulations involved, the pertinent text thereof is set out at Appendix G, infra, at 50-66. During the time in question all of these statutes were a part of the Federal Social Security Act found in Chapter VII of Title 42 of the United States Code and specifically the statutes involved are:

42 U.S.C.A. Sec. 301 (1974); 42 U.S.C.A. Sec. 302(a)(5)(1974); 42 U.S.C.A. Sec. 601 (1974); 42 U.S.C.A. Sec. 602(a)(5)(A)(Supp. 1978); 42 U.S.C.A. Sec. 705(a)(3)(A)(1974); 42 U.S.C.A. Sec. 1201(1974); 42 U.S.C.A. Sec. 1202(a)(5)(A)(1974); 42 U.S.C.A. Sec. 1351(1974); 42 U.S.C.A. Sec. 1352(a)(5)(A) (1974); 42 U.S.C.A. Sec. 1396(1974); 42 U.S.C.A. Sec. 1396a (Supp. 1978)

The federal regulations involved during the time in question were originally codified at 28 F.R. 7931, Aug. 3, 1963. The following regulations taken from 45 C.F.R., Part 70, (1971) are the regulations involved:

45 C.F.R. 70.1 (1971) et seq.; 45 C.F.R. 70.1(c); 45 C.F.R. 70.1(d)(1971); 45 C.F.R. 70.1(e)(1971); 45 C.F.R. 70.3 (1971); 45 C.F.R. 70.4 (1971); 45 C.F.R. 70.5 (1971); 45 C.F.R. 70.6 (1971) 45 C.F.R. 70.7 (1971); 45 C.F.R. 70.9; 45 C.F.R. 70.10; 45 C.F.R. 70.11

QUESTIONS PRESENTED

Under various subchapters of the Federal Social Security Act, found in Chapter VII, Title 42 of the United States Code, Kansas and its sister states receive federal grant-in-aid funding for their welfare programs. Participation by a state in any one or all of the programs is voluntary, but prior to receiving funding, a state must first submit a state plan for each program to be funded and obtain approval for the plan from the Secretary of Health, Education and Welfare (hereinafter referred to as Secretary of HEW). A state plan must describe the program to be funded and how it will be administered, and in doing so the state plan must meet certain conditions imposed by the Social Security Act and regulations adopted by the Secretary of HEW. One statutory and regulatory condition requires the states to adopt and implement a "Merit System of Personnel Administration" for state employees who work in federally funded programs. Pursuant to accompanying statutory authorization, the Secretary of HEW, through appropriate regulations, adopted "Federal Standards for a Merit System of Personnel Administration" which are imposed on all state plans under which federal funding for grant-in-aid programs is received. In meeting the merit system requirement, Kansas relied upon its own Civil Service Act and regulations by incorporating those provisions into each of its state plans. Notwithstanding this fact, Kansas compensated a substantial number of such employees in a manner and in an amount that violated its Civil Service Act and regulations, and in doing so, Kansas also violated the applicable federal standards. This violation

continued over a three and one half year period, and as a result numerous employees of federally funded programs were discriminatorily underpaid. Although Kansas eventually complied with the federal welfare funding scheme, many of the employees are continuing to suffer injury because of the continuing impact of the original violation. In this context the federal questions presented are:

1. When federal funds are extended to the states under the Federal Social Security Act [illegible] state grant-in-aid progr[illegible]s, do the state plans under which such funding is received constitute contracts between the participating states and the federal government, and if so, do these contracts include the terms and provisions of the federally required merit system for state program personnel?

2. Assuming arguendo that the specific terms and conditions of a state plan merit system are not included within the resulting contracts, does the state which receives federal funding nevertheless remain contractually obligated to comply with whatever particular merit system it has adopted in order to receive federal funding?

3. Are the federal standards for a Merit System of Personnel Administration a part of the contract created by state plans?

4. Can state employees working in federally funded grant-in-aid programs assert contract claims as third party beneficiaries where the state violates its merit system with respect to the compensation paid them, if there is neither a remedy provided for such violation in the merit system adopted by the state nor a remedy provided by state law?

STATEMENT OF FACTS

The Petitioners and members of the class they represent are or were Kansas classified civil service employees who now work or have worked in Kansas grant-in-aid programs primarily funded by the United States Government under the Federal Social Security Act. As pointed out, a condition of funding imposed upon all states by the Act is that a state plan is required for each program to be funded, and a further condition imposed is that every state plan must contain a Merit System of Personnel Administration meeting standards adopted by the Secretary of HEW through appropriate regulation. 45 C.F.R. Sec. 70.1 et seq. (adopted 1963, amended 1971), 42 U.S.C.A. Sec. 302(a)(5)(1974), 602(a)(5)(A)(Supp. 1978), 705(a)(3)(A)(1974), 1202(a)(5)(A)(1974), and 1352(a)(5)(A)(1974). A corollary condition is that all states, including Kansas, must actually comply with whatever merit system they adopt in their state plan. See generally 42 U.S.C.A. Sec. 302(a)(5)(A) and 45 C.F.R. 70.1(d). The grant-in-aid funds received by Kansas are administered by the Secretary of the Kansas

Department of Social and Rehabilitation Services (hereinafter referred to as "SRS") who also has the responsibility of formulating all state plans under which the federal funds are obtained.[1] Kan.Stat.Sec. 39-708c (Supp. 1977).

In this case, the evidence undeniably established that there was a direct violation of the Kansas Civil Service Act and regulations which continued over a period commencing November 1, 1970, and ending in May, 1974. Kan.Stat.Sec. 75-2925 et seq., (1977) and Kan. Admin. Reg., Sec. 1-2-1 through 1-9-37 (1966, as amended). As a result, the Petitioners and class members were paid less than other civil service employees who were in the same civil service class and who were doing the same work in the same federal grant-in-aid programs. This violation arose out of the assignment of multiple salary ranges to the civil service class designated as Social Worker I, because the Kansas Civil Service Act and regulations, which were a part of every Kansas state plan, clearly required that only one salary range be assigned to each

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1. Prior to January 1, 1974, it was the Kansas Board of Social Welfare and the Kansas Director of Social Welfare that had this responsibility. In 1973, the Kansas Legislature reorganized the state welfare system effective as of 1974. The Director of Social Welfare under the old system and the Secretary of SRS are, in fact, one and the same person.

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such class. This is not only apparent from the statutory and regulatory language, Kan.Stat. 75-2938(2)(1977), Kan.Adm.Regs. 1-2-13, 1-3-1, 1-4-6 and 1-4-7 (1966 as amended), but was also the testimony of those Kansas officials who had or now have the main responsibility for administering the Kansas Civil Service Act and regulations. Prior to the adoption of the multiple salary ranges, none of these officials were consulted by the State Finance Council, which was the state body that assigned the salary ranges to the Social Worker I class, even though some of these officials were the ones who had primary responsibility for making or formulating recommendations to the Finance Council on such matters.

During the three and a half year period of the violation, Kansas continued to receive federal funding for its grant-in-aid programs. This violation also continued for more than two years after the Federal Civil Service Commission first started advising the appropriate Kansas officials in March of 1972 that the Kansas state plans for the federally funded programs were being violated. Kansas was further advised that the violation was two-fold in that the multiple pay ranges not only violated the State Civil Service Act and regulations, but that such also violated the equal pay for equal work requirements embodied in the federal standards at 45 C.F.R. Sec. 70.6 and 70.7 (1971). Shortly prior to, and during the period of this violation, some Petitioners and class members also complained to their superiors, and the response to these complaints was that there was no right of appeal or available procedure

whereby they could obtain relief resulting from the inequity in wages that existed because of the violation of law.

When the above-described violation of the Kansas Civil Service Act and regulations and federal standards was eventually corrected, the problem was handled by administrative action and with relative ease. A joint meeting between the staffs of the SRS and the Personnel Director for the State of Kansas was held in March, 1974, and an appropriate resolution was approved the following month by the State Finance Council. Pursuant to this resolution, those in the Social Worker I class who were being paid under the lowest salary range assigned to that class were, effective May 18, 1974, placed on the same higher salary range as were the others in the same class who were doing the same work.[2] Even though the direct violation was corrected, the disparity in wages resulting therefrom has been perpetuated because of the manner in which the change was accomplished and because under the operation of the Kansas Civil Service Act and regulations, the initial disparity continues to follow many employees working in the federally funded

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2. Actually, three salary ranges were assigned to the Social Worker I class. However, very few employees worked under the highest salary range. Thus, as a practical matter, this case involves two salary ranges under which almost all employees in the same class doing the same work in the same federally funded programs were paid.

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programs despite the fact that they may receive promotions or salary increases.

On April 18, 1974, the Petitioners filed suit against the Respondents seeking to recover back wages and further praying for declaratory and prospective equitable relief to correct the continuing wage disparity that existed. On March 23, 1977, after the completion of substantial discovery, the district court ruled that as a matter of law, the Petitioners had not established any actionable claim and sustained the Respondents' Motion for Summary Judgment. In doing so, the Court was required to give documentary and other evidence a liberal construction in favor of the Petitioners, Mildfelt v. Lair, 221 Kan. 557, 559, 561 P.2d 805, 809 (1977), although the Respondents have never seriously disputed the facts as stated by the Petitioners. When the court ruled on Respondents' Motion for Summary Judgment, the Petitioners were asserting three separate claims. First, the Petitioners asserted that either or both the Kansas Civil Service Act and regulations and the federal standards were included within contracts created by the Kansas state plans and/or that Kansas was contractually obligated to comply therewith. The Petitioners further alleged that they were entitled to recover for their injury resulting from the violation of state and federal law and regulations on the basis that such violations were a breach of contract to which they were third party beneficiaries.

Second, the Petitioners sought to prevent future injury through a Writ of Mandamus directing the Respondents to place

Petitioners and class members at that level of compensation they would otherwise have attained if there had not been a violation of state and federal law and regulations. Third, the Petitioners contended that they should be allowed to amend their Petition to add still another cause of action based upon the theory that the Kansas Civil Service Act and regulations constituted a contract between Kansas and its employees. This motion to amend was overruled, although the Petitioners' additional theory was discussed by both the state trial and appellate courts since the amendment would undoubtedly have been allowed had summary judgment not been granted.

In granting the Respondents summary judgment, the trial court made no finding as to whether the state plans constituted contracts, but instead held, inter alia, that if the state plans were contracts, the Petitioners were not third party beneficiaries. Appendix B, infra, at 34 . The trial court further erroneously found, inter alia, that if such contracts existed, the Petitioners had not exhausted administrative remedies available to them for the type of relief they were seeking. Appendix B, infra, at 35 . Following this decision, the Petitioners appealed to the Court of Appeals for the State of Kansas and that court affirmed the trial court's result, although it did so for different reasons. The court of appeals specifically held that the question of whether the plaintiffs were third party beneficiaries need not be reached. Instead, the court recognized that conditions imposed upon states as a prerequisite to receiving federal funding are contractual, but held that the Kansas Civil Service Act and

regulations were not a part of any contract existing between Kansas and the federal government and further held that there was no violation of ". . . the very general requirements concerning a Merit System found in the Federal Regulations." Appendix A, infra, at 26 . The court did not discuss or base its decision upon the ground that the Petitioners were barred because of a failure to exhaust available administrative remedies, although this issue was squarely presented to the court.

Following the decision by the Court of Appeals of the State of Kansas, Respondent Harder, the Secretary of SRS, filed a motion requesting the court to modify its opinion in several respects. In part, this motion pertained to the court's misstatement of certain facts, and, in part, the motion related to the court's finding that the Kansas Civil Service Act and regulations were not included in the contracts created by state plans. In requesting the court to modify that part of its opinion, the Respondent Harder stated that the court ". . . made a serious misapprehension of the state plan arrangements." Petitioners concurred with this part of the Respondents' motion. However, the motion was denied without comment on June 22, 1978. On the same day the court, also without comment, denied Petitioners' Motion for Review and/or Modification, and on July 13, 1978, the Supreme Court of the State of Kansas denied a Petition for Review that had been timely filed by the Petitioners.

REASONS FOR GRANTING THE WRIT

It is well settled that the United States has the authority to fix the terms

and conditions upon which its money allotments to states shall be disbursed. King v. Smith, 392 U.S. 309, 333 at n.34 (1968); Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 142-43 (1947). It is also established law that when conditions are attached to grants of federal money, and the grant is accepted by a recipient state, the recipient state is contractually bound to perform the conditions imposed. McGee v. Mathis, 4 Wall. 143, 71 U.S. 143, 155 (1866); United States v. Frazer, 317 F.Supp. 1079, 1083-84 (M.D.Ala., 1970); U.S. v. County School Bd.,Prince George County, Va., 221 F.Supp. 93, 98-100 (E.D.Va., 1963); McDonald v. Stockham Metropolitan Transit District, 36 Cal.App. 3d 436, 441, 111 Cal.Rptr. 637, 641 (Ct.App., 1973); Cf. Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324, 1332 (10th Cir., 1974). "It has long been recognized that Federal grants authorized by Congress create binding contracts . . ." U.S. v. County School Bd., Prince George County, Va., supra, 221 F.Supp. at 99.

At all times material, Kansas has received federal funding under state plans for welfare programs in all major areas encompassed by the Social Security Act. The contractual relationship that arose when Kansas accepted this federal grant-in-aid funding under its state plans and the substantial violation of those state plans by Kansas is the basis for the Petitioners' action and also the subject of this Petition, and the controlling law is federal rather than state law. Garrett v. Moore-McCormack Co., 317 U.S. 239, 245-46 (1942); Ancient Egyptian Arabic Order, Etc. v. Mich-

aux, 279 U.S. 737, 745-46 (1929); California v. Desert Water, Oil & Irriga. Co., 243 U.S. 415, 417 (1917). Cf. Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 278 (1959) and Steele v. Louisville & N.R. Co., 323 U.S. 192, 197 at n.2 (1944).

The federal condition requiring Kansas to have a merit system in substantial conformity with regulatory standards adopted by the Secretary of HEW had the force and effect of law. 45 C.F.R. Sec. 70.1 et seq. (adopted 1963, amended 1971); 42 U.S.C. Sec. 302(a)(5)(1974); 602(a)(5)(A)(Supp. 1978); 705(a)(3)(A)(1974); 1202(a)(5)(A)(1974); and 1352(a)(5)(A)(1974). Rodriquez v. Vowell, 472 F.2d 622, 626 (5th Cir., 1973). Cf. United States v. Correll, 389 U.S. 299, 305-06 (1967). In adopting a merit system, Kansas was free to exercise its discretion within the limitations imposed by the federal standards, and in so doing it could rely upon and use its existing Civil Service Act and regulations, or it could adopt a separate merit system. 45 C.F.R. Sec. 70.3 (1963, amended 1971). Thus, Kansas was allowed latitude in providing for the selection, tenure of office, and compensation of any individual employed. On the other hand, Kansas was not free to act in these areas in a manner contrary to the merit system that it eventually did, in fact, adopt, or in a manner outside the limitations of the federal standards. Kansas could, of course, in the exercise of its discretion, modify its merit system from time to time so long as such modifications were within the latitude allowed by the federal standards. However, when Kansas adopted the multiple salary ranges for the same class of employees doing the same work in the same

federally funded programs, it did not do so pursuant to an amendment or modification of the Civil Service Act and regulations constituting its merit system, but instead, in direct violation thereof. Unquestionably, this is the reason the Kansas court did not rest its decision on a finding that the merit system had, in fact, been amended, but instead stated that a violation thereof was undisputed. See Appendix A, infra, at 25 . The action giving rise to this violation of state law was also outside the permissible limits imposed by the federal standards found in 45 C.F.R.Sec. 70.6 and 70.7 (1971) and the equal pay for equal work interpretations given to those standards by HEW, which is entitled to due deference. See Lewis v. Martin, 397 U.S. 552 (1970). Thus, the violation Petitioners now complain of, illegal on its face, could not, in any event, have been incorporated into the Kansas merit system by appropriate state legislative or regulatory amendment.

Although the Court of Appeals of the State of Kansas recognized the contractual relationship created when Kansas accepted federal funding under its state plans, the court ruled that the statutes and regulations constituting the merit system could not "be held to be a part of the contract between the state and federal governments, because they can be amended without the consent of the federal government." Appendix A, infra, at 26. The court also mentioned that the Petitioners had not cited any decisions to the contrary, however, this disregards the express language of 45 C.F.R. Sec. 70.1(d) which was cited to the court and which states:

> "Laws, rules and regulations to effectuate a merit system in accordance with these standards are a necessary part of the approved State plans required as a condition of Federal grants. Such laws, rules and regulations, and amendments thereto will be reviewed for substantial conformity to these standards. The administration of the merit system will likewise be subject to review for compliance in operation."

The ruling by the court of appeals further overlooks the rationale of the following decisions that were relied upon by the Petitioners in their state court appeal. King v. Smith, supra; McDonald v. Stockham Metropolitan Transit District, supra; Seneca Nursing Home v. Kansas State Board of Social Welfare, supra; and Communication Workers of America v. Union County Welfare Board, 126 N. J. Super. 517, 315 A.2d 709, 713 (1974). Finally, the decision by the state court fails to take into account the supremacy clause of the federal Constitution. Cf. Philbrook v. Glodgett, 421 U.S. 707 (1975); Townsend v. Swank, 404 U.S. 282 (1971).

The ruling that Kansas is not bound by the terms of its own merit system because Kansas can amend its statutes and regulations without federal consent simply cannot be squared with the rationale of those cases cited above and the other authorities cited herein. Likewise, it is in direct conflict with regulations having the force and effect of law. Rodriquez v. Vowell, supra. Cf. United States v. Correll, supra. When Kansas chose to be a recipient of federal funds

for its welfare programs, it clearly agreed to comply with federal conditions attached to such funding. The choice to participate and receive federal funding was left entirely to Kansas, but once that state chose to do so, it voluntarily relinquished any right to act in a manner contrary to the conditions attached to the federal funding it received.

Although the Court of Appeals of the State of Kansas did not reach the question of whether the Petitioners were third party beneficiaries, this is an issue which, for the reasons stated below, should be determined as a matter of federal law. This question involves basically the same considerations as does the issue of the Petitioners' standing and the further issue of whether a federal question is presented under the third party beneficiary claim, which, in the final analysis, is also a matter for the federal courts to decide. The resolution of all these questions involves a determination of the purposes underlying the requirement of a merit system imposed upon all states as a condition for federal funding of their respective welfare programs. The issue of whether the Petitioners should be allowed to maintain an action under a third party beneficiary theory appears to not have been previously decided by the federal courts. In cases presenting a federal question and in the absence of controlling decisions or an act of Congress, it is for the federal courts to fashion the governing rule of law. Clearfield Trust v. United States, 318 U.S. 363, 366-67 (1943). In selecting a federal rule, the primary objective should be uniform federal interpretation and application in view of the vastness of the federal grant-in-aid programs, the ob-

jective and goals of those programs, and the vagaries to which they might otherwise be subjected. Clearfield Trust v. United States, supra, and United States v. Hext, 444 F.2d 804, 807-09 & n.14 (5th Cir., 1971). With respect to establishing sufficient standing to bring their action, the Petitioners must show that they have suffered actual injury and that the interests they seek to protect are arguably within the zone of interests to be protected or regulated by the federal statutes and regulations under consideration. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and Barlow v. Collins, 397 U.S. 159 (1970).

In context of the above principles, attention should now be turned to the relevant parts of the federal funding scheme embodied in appropriate regulations as authorized by statute. The federal standards during the period in question required the states, in their merit systems, to assure equal employment opportunity, 45 C.F.R. Sec. 70.4 (1971); to protect the right of political expression and the right to vote, while at the same time making the Hatch Act applicable, 45 C.F.R. Sec. 70.5 (1971); to provide for career service and career advancement opportunity, 45 C.F.R. Sec. 70.1(e), 70.9, 70.11 (1971); to provide for periodic evaluation of job performance of the merit system employees and to make provision as to how the same should affect promotions, salary advancements, separations, as well as how it would be used in the improvement of an individual employee's job performance, 45 C.F.R. Sec. 70.11 (1971); and to provide for the right of appeal in the event of involuntary ter-

mination, 45 C.F.R. Sec. 70.10 (1971). The standards found at 45 C.F.R. Sec. 70.6 and 70.7 (1971) were interpreted by HEW as requiring equal pay for equal work. The regulatory standards further limit the states by making it clear to them that they must comply with whatever particular merit system they adopt, 45 C.F.R. Sec. 70.1(c) and (d). The cited standards, or ones similar thereto, have been in effect since 1963, and during a period of numerous Congressional amendments to the Social Security Act. It is also important to note that Congress has, for years, authorized the appropriation of large sums for the training and higher education of social workers employed by the states in federally funded welfare programs. 42 U.S.C.A. Sec. 906 and 908 (1974). Under these circumstances, the regulations not only stand by themselves as having the force and effect of law, but should be deemed to have the approval of Congress. Cf. United States v. Correll, 389 U.S. 299 (1967). Thus, the federal government, in requiring a merit system has not only provided for the efficient operation of welfare programs, but it has also reflected an intent to benefit the employees working in these programs and to protect them with respect to basic equality and fairness of treatment in the terms and conditions of their employment.

In this case the Petitioners and class members were victims of a direct and uncontroverted violation of law which continued unabated over three and one-half years. This violation did not arise because of a close question of statutory or regulatory interpretation or application. Nor did it continue because of a lack of knowledge of the violation on the part of Kansas offi-

cials. Instead, the violation of the Kansas Civil Service Act and regulations and the federal standards was clear cut but nevertheless continued to exist for a period of approximately three and one-half years. Further, Kansas did not even move to correct this violation until two years after the federal government started to repeatedly bring it to the attention of the appropriate state officials. Thus, this is not a case of insignificant loss arising out of a close question of law that was soon corrected after notice of violation by the federal government. To the contrary, this is a clear case of continued substantial violation of law which caused the Petitioners substantial economic injury long after the violation should have been corrected. Despite this fact, the Petitioners are left with no remedy under state law as the Kansas merit system simply does not make an administrative remedy available to the Petitioners and the state courts have ruled that there is no available judicial remedy. If the Kansas merit system had made a remedy available to the Petitioners, this may have been sufficient to carry out the Congressional purpose of equality and fairness in treatment. However, in the absence of such remedy, the issue certainly becomes one to be resolved by the federal courts if Congressional purpose is to be implemented.

The Petitioners have forcefully stated that there were no administrative remedies available to them, even though the state trial court found there had been a failure to exhaust such remedies under Kan. Stat. Sec. 75-2929 and 75-2040 (1977). However, these statutes clearly provide no such

remedy, and in fact, the Respondents did not even rely on either statute in their briefs filed with the Court of Appeals of the State of Kansas. Further, and although the Respondents argued the exhaustion doctrine to the Court of Appeals of the State of Kansas, they were unable to demonstrate that appropriate administrative remedies were available to the Petitioners. Undoubtedly, this failure is due to the fact that such remedy simply did not, and does not, exist. This is also the only apparent reason that, at the time in question, the Petitioners were told they had no administrative remedies. Finally, it is clear that although the issue was presented to the Court of Appeals of the State of Kansas, that court did not in any manner base its holding upon a failure to exhaust an available administrative remedy. Thus, the state trial court's decision cannot be asserted as a bar to this court's jurisdiction as "the nonfederal ground relied upon is without fair or substantial support". This would seem to be especially true in view of the fact that the Court of Appeals of the State of Kansas relied solely upon a federal ground in ruling against the Petitioners. NAACP v. Alabama ex rel. Patterson, 357 U.S. 455 (1958); Ward v. Board of County Commissioners, 253 U.S. 17, 22 (1920).

The Petitioners asserted three separate theories in the state courts below, only one of which is involved in this Petition. The two actions not herein involved rested upon questions of state law, but the decisions concerning those actions were not dispositive of, nor did they affect, the action arising under federal law. The Petitioners' mandamus action was brought

under state law solely for the redress of future injury and was decided upon grounds peculiar to state mandamus actions. The other non-federal action, which the Petitioners sought to add to their suit through amendment of their petition, was based upon a direct contract between Kansas and its employees, and involved the question of whether the Civil Service Act and regulations, standing alone, created an employment contract between the state and its employees. The refusal to allow the Petitioners' amendment did not touch upon the federal issue involved in their third action which is whether a state plan incorporating the same act and regulations for the purpose of complying with a federally imposed condition for federal funding creates a binding contractual obligation upon the state to comply with the terms and conditions thereof. This is the issue which the Court of Appeals of the State of Kansas decided against the Petitioners, and it is the primary issue upon which this court should grant a Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Kansas, opinion not designated for publication and, further, to review the Supreme Court of the State of Kansas' denial of Petitioners' Petition for Review, dated July 13, 1978.

Respectfully submitted,

JAMES Z. HERNANDEZ
600 Century Plaza Bldg.
Wichita, Kansas 67202
Counsel for Petitioners

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

NO. 49,065

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES and MARLA SPILLMAN, Individually and on Behalf of All Persons Similarly Situated,

Appellants,

v.

LOWELL LONG, Personnel Director for the State Department of Administration;

HENRY SCHWALLER, Secretary of the State Department of Administration;

DR. ROBERT HARDER, Secretary of the State Department of Social and Rehabilitation Services;

W. VAN ALEXANDER, Personnel Management Chief, State Department of Social and Rehabilitation Services; and

Members of the Finance Council for the State of Kansas,

Appellees.

MEMORANDUM OPINION

Appeal from Shawnee district court, division No. 6; TERRY BULLOCK, judge. Opinion filed May 26, 1978. Affirmed.

Lee H. Woodard and Stephen Blaylock of Woodard, Blaylock & Hernandez, of Wichita, for the appellants.

Bruce A. Roby of the State Department of Social and Rehabilitation Services, and Darrell McNeil of the Department of Administration, of Topeka, Curt T. Schneider, attorney general, and Donald E. Jensen, assistant attorney general, for the appellees.

Before FOTH, C.J., SPENCER and SWINEHART, JJ.

Per curiam: The named plaintiffs represent the class of social workers formerly denominated social workers I-C for purposes of the Kansas civil service classification plan. The defendants are heads of various agencies of the State of Kansas. The trial court granted summary judgment for the defendants. Plaintiffs appeal.

From 1970 until 1974, the social worker I class was sub-divided into I-A, I-B, and I-C. Each subclass was paid according to a different pay range. Where a particular employee was placed depended on his educational qualifications. All employees in the social worker I classification did essentially the same work. As a result of employee dissatisfaction and pressure from federal officials in charge of disbursing federal grant-in-aid money, S.R.S. abolished the multiple pay range system in 1974. The plaintiffs, who had been classed as social workers I-C and paid on range 15, were reclassed as social workers I and placed on range 18. Instead of being placed at the same step

on range 18 that they had occupied on range 15, they were placed at the step which was closest in dollar amount to what they had been receiving on range 15.

The plaintiffs request two forms of relief: (1) mandamus to compel S.R.S. to advance them to the same step on range 18 that they occupied on range 15; and (2) back pay equaling the difference between what they were paid on range 15 and what they would have been paid at range 18.

It is undisputed that S.R.S. violated its own regulations in establishing the multiple pay range system, for K.A.R. 1-4-6 provides that each classification shall be assigned to one pay range. However, this violation does not give rise to the plaintiffs' cause of action for back pay. The plaintiffs rest their petition for back pay on two contract theories. First, they contend that the Kansas statutes and regulations governing the civil service classification and pay plan (found generally at K.S.A. 75-2925 et seq. and K.A.R. 1-4-1 et seq.) constitute terms of their employment contract with the state. The trial court rejected this argument on the grounds that the statutes and regulations, being subject to amendment by the legislature and the promulgating administrative body, cannot constitute contract terms, because "[i]t would be a curious contract indeed which could be unilaterally changed by the employer in such a cavalier fashion." The trial court's analysis was correct. One party may not unilaterally change the terms of a contract; there must be mutual agreement in

order to amend its terms. Gill Mortuary v. Sutoris, Inc., 207 Kan. 557, 562, 485 P.2d 1377 (1971).

The plaintiff's second contract theory fails for the same reason. The plaintiffs claim that they are third party beneficiaries of a contract consisting of the state's agreement to abide by the conditions attached to federal grant-in-aid funds. They cite two cases which hold that the grant recipient is contractually bound to comply with these conditions: United States v. Frazer, 317 F.Supp. 1079 (N.D. Ala. 1970); and McDonald v. Stockton Met. Transit Dist., 36 Cal.App.3d 436, 111 Cal.Rptr. 637 (1973). The plaintiffs claim that the Kansas statutes and regulations were part of the state plan designed to comply with the federal requirement (found generally at 45 C.F.R. 70.7 and 70.8) of a merit pay system for workers employed by state agencies receiving grant-in-aid money, such as S.R.S.. A third party beneficiary may enforce a contract when (1) there is a valid, binding contract, and (2) the party seeking to enforce it is an intended, rather than incidental, beneficiary. Brown v. Wichita State University, 217 Kan. 279, 540 P.2d 66 (1975). The question of whether these plaintiffs were incidental or intended beneficiaries need not be determined, for the plaintiffs have not proved that any contract term was violated. The differentiated pay range system used by S.R.S. was not per se violative of the very general requirements concerning a merit system found in the federal regulations. Neither can the Kansas statutes and regulations be held to be a part of the contract

between the state and federal governments, because they can be amended without the consent of the federal government. The plaintiffs have cited no cases where state statutes and regulations were held to be part of the contract involving disbursements of federal grant-in-aid funds and simple logic shows the reason for this : either the contract would be subject to unilateral amendment of its terms by the state, or the state would be contractually bound to refrain from exercising its power to amend its own statutes.

This court also affirms the trial court's refusal to issue a writ of mandamus pursuant to K.S.A. 60-801 compelling S.R.S. to advance the plaintiffs to the same step of range 18 that they occupied on range 15. Mandamus is not proper unless the defendants' legal duty is clear, and mandamus will not lie for an anticipated breach; that is, a demand must be made and performance refused before a proceeding for mandamus is instituted. Adams v. Marshall, 212 Kan. 595, 604, 512 P.2d 365 (1973). The plaintiffs' demand for mandamus does not meet either requirement.

This court on review adopts the findings of fact and conclusions of law as set out in the memorandum decision of the trial court. Costs are taxed against the defendants. Judgment is affirmed.

APPENDIX B

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS, SIXTH DIVISION

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated, Plaintiffs, vs. LOWELL LONG, PERSONNEL DIRECTOR FOR THE STATE DEPARTMENT OF ADMINISTRATION, HENRY SCHWALLER, SECRETARY OF STATE DEPARTMENT OF ADMINISTRATION, ROBERT HARDER, SECRETARY OF STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, W. VAN ALEXANDER, PERSONNEL MANAGEMENT CHIEF, STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, and MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS, Defendants.	CASE NO. 125,473

MEMORANDUM DECISION

As reflected by their petition and proposed amended petition, plaintiffs in this action seek both prospective relief in mandamus and to recover back wages for themselves, and for a class of others allegedly similarly situated. These wages, plaintiffs urge, are owing to them as third party beneficiaries of a contract between the State of Kansas and the United States Department of Health, Education and Welfare and by virtue of the Kansas Civil Service Act and regulations, which Act and regulations plaintiffs contend are a part of their employment contract with the State of Kansas. Defendants have filed motions for summary judgment alleging that they are entitled to judgment as a matter of law and plaintiffs have moved to amend their petition. Substantial discovery has been conducted by the parties and the issues have been thoroughly and completely briefed, at least by plaintiffs. On February 11, 1977, these motions were orally argued to the Court. At that hearing, plaintiffs also presented a motion for the preservation of all records by defendants pending the outcome of this litigation, which motion was concurred in by the defendants and granted by the Court. The Court has now considered all outstanding motions of the parties, has reviewed the briefs and arguments of counsel and the voluminous files and records of the Court in connection with this matter and is now prepared to rule thereon.

UNCONTROVERTED FACTS

Although much more might be written about the facts surrounding the plaintiffs' claims in this action, the following brief recitation will suffice for the purpose of the disposition of the pending motions. Prior to November 1, 1970, a single salary range was assigned to the Kansas Civil Service Class known as Social Worker I, and thus, all persons holding a position in that class were paid according to the same salary range. By action of the State Finance Council, however, during a meeting held September 17, 1970, the Social Worker I Class was divided into three categories: Social Worker IA, Social Worker IB and Social Worker IC. Such distinctions were based upon the recommendation of an independent consulting firm employed by defendants to assist in the organization of the Department of Social and Rehabilitation Services. The primary distinction between such categories was the educational background of the employee. In particular, Social Worker IC was designated as a person with a college degree but with no major in social work, Social Worker IB was a person with a college degree having had a major in social work and Social Worker IA was a person with advanced college training beyond the baccalaureate degree. A different salary range was assigned to each such category. Inasmuch as this suit concerns only those persons in categories IB and IC, no further reference will be made to category IA. The pay scale known as "salary range 15" was assigned to Social Worker IC category and that pay scale known as "salary range 18" was assigned to the Social Worker IB category. Notwithstanding the difference in educational background, however,

the work done and the responsibilities assumed by persons in categories IB and IC were the same. On or about April 22, 1974, the State Finance Council abolished the Social Worker IC category and assigned "salary range 18" to all those who had been previously categorized as Social Worker IC. Although those who had been categorized as Social Worker IC were thereafter on the same salary range with those previously categorized as Social Worker IB, plaintiffs contend that the inequity created by the original assignment of different salary ranges still continues by virtue of certain promotions which had occurred during the interim between the creation of the separate categories and the abolition thereof.

Shortly after the three Social Worker I categories mentioned were created in 1970, the Director (now Secretary) of Social and Rehabilitation Services was notified by the Executive Director of the Department of Administration, for and on behalf of the Finance Council, of the adoption of these as well as other Civil Service categories. That notification provided, inter alia, "Any classified or classified-exempt employee desiring to appeal the allocation of his position should fill out the prescribed form, sample of which is attached, setting forth all the required information indicated as well as his reasons for disagreement with the proposed allocation of position." This notification together with all necessary forms was forwarded with a cover letter by the Director of Social and Rehabilitation Services to all employees effected. Notwithstanding such notifica-

tion, none of the named plaintiffs nor any of the persons in the class they purport to represent appealed the allocation of the position to the category described.

In connection with the procurement of certain federal funds for the financing of various welfare programs administered by the State of Kansas, the State was required to adopt a "State Plan" for the administration of such federal funds. In the formulation of that Plan, certain federal guidelines designed to guarantee the efficient and orderly administration of the funds of the federal government were required to be followed so that such funds could be devoted in as undiluted a fashion as possible to the purpose intended, to-wit: The relief of poverty and its attendant hardships. In order to further the goal of efficient administration of federal funds, the State was required, as a part of it's State Plan" to adopt a merit system of personnel administration. The federal guideline mandating such a merit system provided, inter alia, "An integral part of the grant-in-aid programs is the maintenance by the state and local governments of a merit system of personnel administration for the grant-aided agencies. The Federal agencies are interested in the development and continued improvement of State and local merit systems but exercise no authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems." (Emphasis supplied.) To comply with the merit system requirement of federal funding, the State adopted it's Civil Service Act, and regulations promulgated pursuant thereto,

as it's "merit system" under the federal guidelines. In this connection, the Kansas Civil Service Act, and in particular K.S.A. 75-2938, as amended, and related regulations, K.A.R. 1-4-1, 6, 7, and 8, provide that the Personnel Director of the State of Kansas shall assign one of the salary ranges prescribed to each class of positions and that each employee in such class shall be paid within such salary range. In addition, K.A.R. 1-2-13 provides that the term "class" means one or more positions sufficiently similar with respect to duties and responsibilities that it may be given the same title and that the same schedule of pay can be applied with equity to all positions in the class under the same or substantially the same employment conditions.

Subsequent to November 1, 1970, no person previously employed in the Social Worker I category and then assigned to the Social Worker IC category applied for the Social Worker IB position nor, as aforementioned, did any such person appeal from his or her position allocation. With respect to persons alleged to be in the class of plaintiffs who were employed subsequent to November 1, 1970, none of such persons who were employed in the Social Worker IC category contended they were wrongfully assigned to such category nor did they appeal from any such assignment, nor did they apply for admission to the Social Worker IB category.

CONCLUSIONS OF LAW

Plaintiff's first contention, that the defendants violated federal merit

selection standards and, thereby, breached the contract between Kansas and the United States fails at the threshold. Without doubt, of course, one may avail oneself of the promise made by another to a third party for the benefit of himself (Brown v. Wichita State University, 217 Kan. 279, 540 P.2d 266). The essential element of the third party beneficiary concept, however, is that the contracting parties must have indeed intended to benefit the third party. (Martin v. Edwards, 219 Kan. 466, 548 P.2d 779). In the case at bar, the contract between the State and the United States was for the primary purpose of procuring federal funds to alleviate poverty in the State of Kansas through the State's welfare programs. The merit selection requirement of the federal program, as set forth in the federal guidelines for the sole purpose of assuring that the federal dollars would efficiently reach the intended recipients, to-wit: the Kansas welfare clients. The guidelines did not designate the employees of the Department of Social and Rehabilitation Services even as incidental beneficiaries of the federal guidelines. Quite to the contrary, such guidelines expressly disavowed any such intent. Assuming, arguendo, that the State Plan did violate the federal guidelines and therefore the federal contract, the federal remedy was to enforce State compliance or terminate federal funding. Whatever the remedies of the parties to the contract, however, it is plain from a reading of the guidelines that no rights were given to State employees to enforce the federal contract through civil damage suits. Inasmuch as plaintiffs are not third party beneficiaries of the contract

between the State and the United States, therefor, plaintiffs' first contract claim is without merit and defendants' motion for summary judgment insofar as such claim is concerned should be sustained. In connection with this contention, however, one additional comment is germaine. Even if it be assumed that the federal contract is one to which plaintiffs, as third party beneficiaries, can resort for relief, the terms of that contract are not helpful to plaintiffs. The federal contract incorporating as it does the State Civil Service Act and regulations, requires the exhaustion of administrative remedies prior to judicial intervention. As will be noted more fully hereafter, plaintiffs have failed to avail themselves of this remedy and, consequently, are not entitled to relief in the courts even under the express terms of the contract they seek to enforce.

Plaintiffs next contend that the State Civil Service Act and related regulations, constitute a part of the employment contract between plaintiffs and the State of Kansas. In this connection plaintiffs also contend that the Kansas Act requires equal pay for equal work; that such concept was violated in the case at bar, giving rise to a contract cause of action in the plaintiffs for back pay and future relief in the nature of specific performance. This contention likewise lacks merit.

First, even if the Civil Service Act and regulations form a part of plaintiffs' employment contract, those statutes and regulations require the exhaustion of

administrative remedies prior to judicial review. Pursuant to K.S.A. 75-2929 and K.S.A. 75-2940, the State Civil Service Commission is authorized to hear appeals from those who are not examined for or employed under Civil Service classifications to which they claim entitlement. Not only do these statutes provide for such appeals, but each of the plaintiffs employed when the categories in question were created, were notified of the availability of such procedure at the time the categories were established in 1970. In this connection, Thompson v. Amis, 208 Kan. 658, 493 P.2d 1259, is controlling. That case makes it plain that the jurisdiction of the Civil Service Commission to hear such grievances is exclusive and any judicial review thereof is limited to the appeal from such administrative determination, as provided by K.S.A. 60-2101. In the absence of such administrative review and judicial appeal, the Court is not permitted to interfere with administrative proceedings until administrative remedies have been exhausted. (22 Am.Jur. 2d, Declaratory Judgments, Sec.15). It should also be noted that at the time the three social worker categories were created in 1970, the pay of no one was reduced. Those persons advanced to categories IB and IA were simply given pay increases. It is puzzling how can one one complain of a breach of contract if the income which he had agreed to take for the work rendered was actually paid!

Second, with respect to those plaintiffs who were employed subsequent to the establishment of the three social worker categories in 1970, such applicants

likewise had but failed to take an administrative review of the decision which placed them in the category below which they claim they were entitled under the Civil Service Act. In addition, none of these plaintiffs applied for the higher paying category. It is now clear that one is not entitled to the benefit of a position until he has been duly appointed to it. (United States v. Testan, 96 Sup.Ct. 948.) Although plaintiffs in this action admit that they were appointed to the proper class within the State Civil Service System (i.e., Social Worker I) they contend they were denied the benefit of the pay range to which they were entitled under the "equal pay for equal work" concept. The flaw in this reasoning is that plaintiffs' claim is grounded in contract. Plaintiffs applied for a position as a Social Worker. They were offered a position as Social Worker IC at a specified pay range. They accepted this position. They now complain that they might have gained a higher pay had they insisted upon employment at the Social Worker IB category. Such is not the law of contracts. These plaintiffs made their bargain and enjoyed the benefits of it. They cannot now contend they should have made a different agreement.

Third, it is readily apparent from recent history that the State Civil Service Act and regulations, as well as pay scales assigned to Civil Service categories, are frequently changed by Legislative enactment and Finance Council or other administrative rule. It would be a curious contract indeed which could be unilaterally changed by the employer in such

cavalier fashion. If plaintiffs' contentions were accepted, the effect would be to freeze all statutes and employment regulations for any specific employee at the moment of his or her employment. Such a result would hamstring succeeding Legislatures and administrative agencies. It is apparent, then, that the Civil Service Act and regulations are not a contract upon which plaintiffs can rely for relief in a civil damage suit. On the other hand, it cannot be disputed that employees under the State Civil Service Act are entitled to the benefit of the regulations promulgated for their benefit. However, if they fail to get those benefits, their remedy is to seek administrative enforcement of their rights, and, if necessary, to take an appeal from any adverse administrative review, to the courts of this State. From even a reading of the public press, it should be plain by now that all the courts of this land cannot operate all branches of government. Courts lack authority to tax and raise funds to carry out their decrees and they lack administrative facilities to carry out broadsweeping directives. It was undoubtedly for these reasons that administrative solutions to administrative problems, at least in the first instance, were created by our Legislature. From the foregoing it is apparent that even should plaintiffs amend their petition to add this contract count, it would be insufficient as a matter of law. Defendants' motion for summary judgment on this contention, therefore, should be likewise sustained. With respect to plaintiffs' final contention demanding prospective relief in mandamus, such contentions are premature. In their proposed

amended petition, plaintiffs contend that they continue to be underpaid even though they have been now admitted to the correct pay scale in the Social Worker category. As noted before, plaintiffs have the right to an administrative review by the State Civil Service Commission for the redress of such inequities. Should such Commission without legal cause or excuse, fail to correct alleged infraction of Civil Service regulations, appeal may be had to this Court. In the absence of an opportunity by such Commission to review, and, if necessary correct its pay scale insofar as plaintiffs are concerned, however, it would be an unwarranted intrusion by the judicial branch into the administrative affairs of the executive branch to order such adjustment. Consequently, defendants' motion to dismiss this count of plaintiffs' proposed amended petition should be likewise sustained for failure to exhaust available administrative remedies.

Inasmuch as all counts of plaintiffs' proposed amended petition have been considered, it is not necessary to rule on plaintiffs' motion to amend their petition to add additional parties and additional counts for the simple reason that neither such parties nor such counts would suffice to give plaintiffs a justiciable cause of action at this time.

JUDGMENT

Upon the foregoing findings of fact and conclusions of law defendants' motion for summary judgment is hereby sustained in all particulars, costs taxed to plain-

tiffs. This memorandum decision shall serve as the Court's entry of judgment, no further Journal Entry being required.

Dated: March 23, 1977.

/s/ Terry Bullock
Judge of the District Court

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

LINDA RUTLEDGE, et al Appellants	)	
v.	)	No. 49,065
LOWELL LONG, et al Appellees	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for rehearing and/or modification.

Petition DENIED.

Appellants' response and partial concurrence with motion of the Appellee Harder for modification of the Court's memorandum opinion.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Court of Appeals

Date June 22, 1978

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Linda Rutledge, et al., Appellants,	)	
v.	)	No. 49,065
Lowell Long, et al., Appellees.	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for Review.

Considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date July 13, 1978

APPENDIX E

Rule No. 8.03

SUPREME COURT REVIEW OF
COURT OF APPEALS DECISION

* * * *

(b) Whenever a review of a decision of the Court of Appeals has been granted by the Supreme Court, the case shall be heard on the record and briefs previously filed with the Court of Appeals. Any party may supplement his original brief with additional support for his contentions within thirty (30) days after the order granting the review. Thereafter any opposing party shall have thirty (30) days to respond. Except by order of the court a supplemental brief shall not exceed one-half the length permitted for original briefs as prescribed by Rule No. 6.07. The timely service of a petition for review shall stay the issuance of the mandate of the Court of Appeals. If review is refused, the decision of the Court of Appeals shall be final as of the date of refusal and the mandate of the Court of Appeals shall be issued by the clerk forthwith.

APPENDIX F

EXCERPTS FROM THE RECORD
SHOWING THE FEDERAL QUESTIONS
RAISED BY THE PETITIONERS

The Court of Appeals of the State of Kansas recognized the Petitioners' claim giving rise to the federal questions now involved in this Petition for a Writ of Certiorari. This is clear from the following language in the Court's opinion:

> "The plaintiff's second contract theory fails for the same reason. The plaintiffs claim that they are third party beneficiaries of a contract consisting of the state's agreement to abide by the conditions attached to federal grant-in-aid funds . . . . The plaintiffs claim that the Kansas statutes and regulations were part of the state plan designed to comply with the federal requirement (found generally at 45 C.F.R. 70.7 and 70.8) of a merit system for workers employed by state agencies receiving grant-in-aid money, such as S.R.S.. . . . . The question of whether these plaintiffs were incidental or intended beneficiaries need not be determined, for the plaintiffs have not proved that any contract term was violated. The differentiated pay range system used by S.R.S. was not per se violative of the very general requirements concerning a merit system found in the federal regulations. Neither can the Kansas statutes and regulations be held to be a part of

> the contract between the state and federal governments, because they can be amended without the consent of the federal government. The plaintiffs have cited no cases where state statutes and regulations were held to be part of the contract involving disbursements of federal grant-in-aid funds and simple logic shows the reason for this: either the contract would be subject to unilateral amendment of its terms by the state, or the state would be contractually bound to refrain from exercising its power to amend its own statutes."

Appendix A, pp. , infra.

The Petitioners' claim under which the federal questions arose was clearly before the District Court of Shawnee County, Kansas, as shown by the following contentions, quoted verbatim, which were briefed and argued in the Petitioners' brief filed in opposition to the Respondents motion for summary judgment:

> "The state plans under which Kansas received federal funding for grant-in-aid social welfare programs constituted express contracts."

> "The Plaintiffs are entitled to recover under the contracts created by the state plans as third-party beneficiaries."

> "The defense of failure to exhaust administrative remedies is not available to the Defendants."

On Petitioners' appeal from the trial court to the Court of Appeals for the State of Kansas, they briefed and argued, inter alia, the following issues which are quoted verbatim:

"DID THE KANSAS GRANT-IN-AID STATE PLANS WHICH INCORPORATED THE KANSAS CIVIL SERVICE ACT AND REGULATIONS AS THE FEDERAL STANDARDS CONSTITUTE EXPRESS CONTRACTS?

The fact that the federal statutory and regulatory scheme for funding state grant-in-aid programs requires a merit system of personnel administration to be included in all state plans and that the Kansas state plans met this requirement by incorporating the Kansas Civil Service Act and Regulations has already been fully discussed. (P.p. 5-7 supra.) It is sufficient to state that the appropriate Kansas officials were aware of this requirement and that they likewise knew that compliance with the Act and Regulations in the administration and implementation thereof, as well as the Federal Standards, was also a federally imposed requirement. This being the case the nature of the state plans becomes of paramount importance for, as has been pointed out in the preceeding section, there appears to be little question that the Standards were, in fact, violated. Thus, the question becomes one of whether the state plans were express contracts because if such is the case the violations which have been established would constitute a breach thereof."

* * * *

"IF THE KANSAS STATE PLANS CONSTITUTE EXPRESS CONTRACTS CAN THE PLAINTIFFS RECOVER THEREUNDER AS THIRD PARTY BENEFICIARIES?

In regard to the plaintiff's third party beneficiary claim they rely upon the violation of both the Kansas Civil Service Act and Regulations as well as the violation of the Federal Standards for a Merit System of Personnel Administration. In other words the plaintiffs assert that the violation of each constitutes a separate and independent breach of contract either of which will support their recovery as third party beneficiaries."

* * * *

"DO THE PLAINTIFFS HAVE ADMINISTRATIVE REMEDIES AVAILABLE TO THEM?

The trial court found that the plaintiffs failed to exhaust their administrative remedies prior to judicial review and further stated that these remedies were avialable under K.S.A. 1976 Supp. 75-2929 and K.S.A. 75-2940 (Vol. I, Memorandum Decision p. 245,at p. 7) This finding was important to the Trial Court's ultimate holding as it was the primary ground upon which the Court sustained the defendants motion for summary judgment with respect to the Plaintiffs mandamus action and it was also a supporting ground with respect to the Court's rulings on the plaintiffs two other theories."

* * * *

Following the decision by the Court of Appeals for the State of Kansas, and in their Petition for Review filed in the Supreme Court of the State of Kansas, the Petitioners, under a paragraph entitled "Issues Upon Which Review is Sought", set forth, and later briefed and argued, inter alia, the following:

"2. With respect to the Appellants' third party beneficiary action:

A. Was and is the Kansas Civil Service Act and Regulations included within contracts between the Kansas Department of Social and Rehabilitation Services ("SRS") and/or the State of Kansas and the Federal Government and/or the United States Department of Health, Education and Welfare ("HEW") under which Kansas received Federal funding of its grant-in-aid programs?

B. If the actual terms and provisions of the Kansas Civil Service Act and Regulations are not a part of such contracts, was Kansas contractually obligated to the Federal Government and/or HEW to comply with its own Civil Service Act and Regulations with respect to those employees who worked in the Kansas grant-in-aid programs for which Federal funding was received?

C. Were the Federal Standards for a Merit System of Personnel Administration included within contracts existing between Kansas and/or SRS and the Federal Government and/or HEW and, if so, were such Federal Standards violated by Kansas with respect to those who were employed as Social Worker I-C's in the Kansas grant-in-aid programs for which Federal funding was received?

D. Were the Appellants and other members of the classes who they seek to represent, all of whom were previously designated as Social Worker I-C's, third party beneficiaries under such contracts between Kansas and/or SRS and the Federal Government and/or HEW by which Kansas and the SRS received Federal funding for those grant-in-aid programs in which the Appellants and said Social Worker I-C's were employed?"

APPENDIX G

I

FEDERAL STATUTES INVOLVED

SUBCHAPTER I--GRANTS TO STATES FOR OLD-AGE ASSISTANCE AND MEDICAL ASSISTANCE FOR AGED

* * * *

Sec. 301. Authorization of appropriations

For the purpose (a) of enabling each State, as far as practicable under the conditions in such State, to furnish financial assistance to aged needy individuals, (b) of enabling each State, as far as practicable under the conditions in such State, to furnish medical assistance on behalf of aged individuals who are not recipients of old-age assistance but whose income and resources are insufficient to meet the costs of necessary medical services, and (c) of encouraging each State, as far as practicable under the conditions in such State, to furnish rehabilitation and other services to help individuals referred to in clause (a) or (b) to attain or retain capability for self-care, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare

(hereinafter referred to as the "Secretary") State plans for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged.

* * * *

Sec. 302. State old-age and medical assistance plans—Contents

(a) A State plan for old-age assistance for the aged, or for old-age assistance and medical assistance for the aged must—

* * * *

(5) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory

committees established by the State Agency;

* * * *

SUBCHAPTER IV—GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD—WELFARE SERVICES

* * * *

Sec. 601. Authorization of appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

* * * *

Sec. 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must-- (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency;

SUBCHAPTER V—MATERNAL AND CHILD HEALTH AND CRIPPLED CHILDREN'S SERVICES

* * * *

Sec. 705. State plans; contents; approval by Secretary

(a) In order to be entitled to payments from allotments under section 702 of this title, a State must have a State plan for maternal and child health services and services for crippled children which—

* * * *

(3) provides (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are necessary for the proper and efficient operation of the plan and (B) provides for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in providing services and in assisting any advisory committees established by the State agency;

SUBCHAPTER X—GRANTS TO STATES FOR AID TO BLIND

* * * *

Sec. 1201. Authorization of appropriations

For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy individuals who are blind

and of encouraging each State, as far as practicable under such conditions, to furnish rehabilitation and other services to help such individuals attain or retain capability for self-support or self-care, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for aid to the blind.

* * * *

Sec. 1202. State plans for aid to blind

(a) A State plan for aid to the blind must-- (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid sub-professional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low-income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in

assisting any advisory committees established by the State agency.

SUBCHAPTER XIV—GRANTS TO STATES FOR AID TO PERMANENTLY AND TOTALLY DISABLED

* * * *

Sec. 1351. Authorization of appropriations

For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy individuals eighteen years of age and older who are permanently and totally disabled and of encouraging each State, as far as practicable under such conditions, to furnish rehabilitation and other services to help such individuals attain or retain capability for self-support or self-care, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid to the permanently and totally disabled.

Sec. 1352. State plans for aid to permanently and totally disabled

(a) A State plan for aid to the permanently and totally disabled must-- (5) provide (A) such methods of administration

(including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency;

SUBCHAPTER XIX—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

Sec. 1396. Authorization of appropriations

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficent to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be

appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance.

* * * *

Sec. 1396A. State plans for medical assistance—Contents

(a) A State plan for medical assistance must— (4) provide (A) such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods, and including provision for utilization of professional medical personnel in the administration and, where administered locally, supervision of administration of the plan) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency;

II

FEDERAL REGULATIONS INVOLVED

PART 70--STANDARDS FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION[1]

* * * *

Sec. 70.1 Purpose

(a) These Federal standards are issued to implement the statutory and regulatory provisions requiring the establishment and maintenance of personnel standards on a merit basis in the administration of various grant-in-aid programs. The merit system standards are issued by the Social Security Administration, the Welfare Administration and the Public Health Service of the Department of Health, Education, and Welfare, the Bureau of Employment Security, Department of Labor, and the Office of Civil Defense, Department of Defense.

(b) The development of proper and efficient administration of the grant-in-aid programs is a concern of both the Federal and the State agencies cooperating in the programs. Proper and efficient administration requires clear definition of functions, the employment of the most competent available personnel, and the

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1. Adopted 1963, Amended 1971.

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development of staff morale and individual efficiency. The merit system provisions of Federal statutes relating to the grant-in-aid programs are directed to the achievement of these ends through the application of personnel standards on a merit basis.

(c) An integral part of the grant-in-aid programs is the maintenance by the State of a merit system of personnel administration applicable to the grant-aided agencies. The Federal agencies are interested in the development and continued improvement of State merit systems but exercise no authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems.

(d) Laws, rules and regulations to effectuate a merit system in accordance with these standards are a necessary part of the approved State plans required as a condition of Federal grants. Such laws, rules and regulations, and amendments thereto will be reviewed for substantial conformity to these standards. The administration of the merit system will likewise be subject to review for compliance in operation.

(e) Continuing application of these standards will give reasonable assurance of a proper basis for personnel administration, will promote a career service, and will result in increased operating efficiency in the State agencies. In order to assist States in maintaining their merit systems under these standards,

technical consultative service will be made available.

* * * *

Sec. 70.3. Merit system organization

(a) If a State has a statewide civil service system operating under standards substantially equivalent to those herein provided, such State civil service system should be applicable to the State agencies as defined above.

(b) In the absence of a State civil service system with substantially equivalent standards, there will be established a merit system administered by an impartial body herein referred to as the Merit System Council, the members of which are appointed by the administrative agencies or by the Governor on recommendation of the administrative agencies, for stated overlapping terms, and no member of which is otherwise employed as an official or employee of any of the State agencies affected.

(c) The executive of the merit system, referred to as the Merit System Director, will be appointed under the merit system. Qualifications for the Director will include training and experience in a field related to merit system administration, and known sympathy with the principles of the merit system.

(d) In the interests of economy and of efficient administration, a joint merit system should serve all the State

agencies as defined above unless, because of special circumstances, it is not feasible to establish such a joint system.

* * * *

Sec. 70.4. Prohibition of discrimination

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action, because of political or religious opinions or affiliations or because of race, national origin or other nonmerit factors will be prohibited. The regulations will include appropriate provisions for appeals in cases of alleged discrimination.

* * * *

Sec. 70.5. Limitation of political activity

Participation in political activity of any employee of the State or local agencies, except those hereinbefore exempted, will be prohibited under the merit system rules, except that an employee will have the right freely to express his views as a citizen and to cast his vote. Such prohibited political activity will include in substance the activities prohibitied employees in federally-aided agencies under the Federal Hatch Political Activities Act, as amended. (Individuals whose principal employment, whether or not under the merit system, is in a federally-aided agency, are subject to the prohibitions in

the Hatch Act, administered by the U.S. Civil Service Commission.)

* * * *

Sec. 70.6. Classification plan

A classification plan for all positions in the agency, based upon investigation and analysis of the duties and responsibilities of each position, will be established and maintained. The classification plan will include an appropriate title for each class of position, a description of the duties and responsibilities of positions in the class, and requirements of minimum training, experience, and other qualifications suitable for the performance of the duties of the class of position.

* * * *

Sec. 70.7. Compensation plan

A plan of compensation for all classes of positions in the agency will be established and maintained. Such plan will include salary schedules for the various classes in which the salary of a class is adjusted to the responsibility and difficulty of the work. The salary range for each class will consist of minimum, intervening, and maximum rates of pay to provide for salary advancements within the range. In arriving as such salary schedules, consideration will be given to the prevailing rates for comparable positions in other departments of the State

and to other relevant factors. The State administrative agencies will adopt plans for salary advancements based upon quality and length of service. Salary laws and rules and regulations uniformly applicable to departments of the State government will be given consideration in the formulation of the compensation plan.

* * * *

Sec. 70.10. Layoffs and separations

(a) Regulations will be established governing layoffs, suspensions and separations, and governing leaves and the conditions for payment of salary at termination of services. Such regulations will include provisions for adequate competition among employees in classes affected by reduction in force, and for retention of employees based upon systematic consideration of type of appointment, length of service and efficiency.

(b) Employees who have completed the required probationary period of appointment and acquired permanent status will not be subject to separation except for cause, or for reasons of curtailment of work or lack of funds. In the event of separation, permanent employees will have the right of appeal to an impartial body through an established procedure provided for in the merit system rules.

* * * *

Sec. 70.11. Performance evaluations

A system of periodic evaluations of work performance will be maintained. The manner in which such performance evaluations are to be used in promotions, salary advancements, and separations, as well as in the improvement of individual performance, will be provided for by regulation.

* * * *

AFFIDAVIT OF SERVICE

JAMES Z. HERNANDEZ, being first duly sworn, deposes and states:

That in accordance with Rule 33(2)(e), Supreme Court Rules, he has forwarded three (3) copies of this Petition for a Writ of Certiorari to the Court of Appeals of the State of Kansas and three (3) copies of this Affidavit of Service to the following:

Mr. Darrell McNeil
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the State of Kansas
Second Floor, Statehouse
Topeka, Kansas 66612

Mr. Curt T. Schneider
Attorney General for the State
of Kansas,
and,
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James Z. Hernandez

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600 Century Plaza Building
Wichita, Kansas 67202
(316) 263-4958
Attorney for Appellant

Subscribed and sworn to before me this 10th day of October, 1978.

SAUNDRA J. PARKS
Sedgwick County, Ks.
My Appt. Exp. 9-26-80

Saundra J. Parks

Saundra J. Parks, Notary Public

My Term Expires:

9-26-80

Supreme Court, U. S.
FILED
NOV 9 1978
MICHAEL RODAK, JR., CLERK

No. 78-613

In the Supreme Court of the United States

OCTOBER TERM, 1978

LINDA RUTLEDGE, *et al.*, *Petitioners*,

v.

LOWELL LONG, Personnel Director for the State Department of Administration, *et al.*, *Respondents*.

BRIEF IN OPPOSITION

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W. VAN ALEXANDER, Personnel Chief of the State Department of Social and Rehabilitation Services

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-613

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated, *Petitioners,*

v.

LOWELL LONG, Personnel Director for the State Department of Administration; HENRY SCHWALLER, Secretary of State Department of Administration; ROBERT HARDER, Secretary of State Department of Social and Rehabilitation Services; W. VAN ALEXANDER, Personnel Chief, State Department of Social and Rehabilitation Services; and MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS, *Respondents.*

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Kansas

BRIEF IN OPPOSITION

Statement of Facts

The original plaintiffs (petitioners) are Linda Rutledge, Frances D'Annunzio, Janet Skiles and Marlo Spillman. At the time of the filing of the original action they were Kansas Civil Service employees of the Department of Social and Rehabilitation Services of Kansas and each of their job classifications was designated as Social Worker I C. These plaintiffs for the earlier periods of their action had been employees

of Sedgwick County until July 1, 1973, when New Sec. 17 of Chapter 186 of the 1973 Session Laws of Kansas transformed their status to state agency employees.

The petitioners' original petition named five defendants (now respondents): Dr. Robert Harder, Secretary of Social and Rehabilitation Services of Kansas; W. Van Alexander, Personnel Management Chief of the State Department of Social and Rehabilitation Services of Kansas; Henry Schwaller, then the Secretary of the State Department of Administration; Lowell Long, then the Personnel Director for the Department of Administration; and members of the Finance Council for the State of Kansas.

The petitioners filed their original action in the District Court of Sedgwick County, Kansas. Venue of the matter was later changed to the District Court of Shawnee County. The petitioners later attempted to file a second amended petition which would have named the Governor and State Treasurer of Kansas and the Director of the Division of Accounts and Reports of the State Department of Administration as additional defendants. The proposed amended petition also would have added Marvin Dawson as a plaintiff and would have indicated the change of plaintiff Rutledge's name to Sorrel. The petitioners' motion to amend their petition was considered by the trial court simultaneously with the various motions of the defendants (respondents) for summary judgment. Summary judgment for the respondents was granted and that opinion is the subject of the subsequent appeals.

The petitioners had alleged before the trial court

that violations of the state civil service statutes and regulations created violations of state plan contracts with the Secretary of Health, Education, and Welfare and of an express state contract of which the petitioners could supposedly assert claims for increased previous salaries as third party beneficiaries. The petitioners also sought mandamus relief to increase their present and future salaries.

The state of Kansas has filed state plans for, does participate in, and receives federal financial participation for Social Security Act programs including those of Titles I, IV, V, X, XIV, XIX, and XX. Pursuant to Kansas Statutes Annotated 39-708 (frequently amended over this period) the plans have been developed for Kansas by the State Board of Social Welfare and are now developed by the Secretary of Social and Rehabilitation Services of Kansas. The individual holding the Secretary position since its creation in 1974 was the former Director of Social Welfare. However, neither the Director position nor the individual was a member of the former State Board. The continuity and responsibility of the present office of Secretary for the previous State Board is created by statutes, K.S.A. 75-5302 and K.S.A. 75-5311.

No separate merit system was developed in Kansas for the state plans, but the already established state civil service system was utilized. So the petitioners' proposed classes or subclasses would have included Kansas classified civil service social workers who did not work in any programs receiving federal funds. Also no class of any nature was certified.

The state civil service system was under the admin-

istrative control of the State Finance Council. That council on September 17, 1970, set the employment classification for Social Worker I by dividing it into categories of Social Worker I A, Social Worker I B, and Social Worker I C. The classifications were based upon educational qualifications of a college degree without a social work major for I C, a college degree with social work major for I B, and advanced college training for the I A. Each category running from I C to I A was assigned a different ascending salary range. The Department of Health, Education, and Welfare questioned those actions by audit exception, but took no formal sanctions. On April 22, 1974, the council abolished the remaining I C positions and the remaining I C's joined the I B's on the same salary range. (Many I C's who performed financial eligibility functions rather than social services were reclassified to Income Maintenance Worker classifications, including petitioners Rutledge and Spillman.) The petitioners claimed and the trial court found for the purposes of the summary judgment motion that the work done and responsibilities of the I A's and I B's had been the same. The petitioning former I A's claimed that they had been denied the equal pay of the I B's and that they were still assigned to lower ends of salary ranges because of their earlier classification to a lower range.

The trial court found that the plaintiffs had accepted their I C positions without insisting on higher I B positions, that they had failed to exhaust administrative appeal remedies (which they could still exercise and, if necessary, appeal to that court) and that they were not proper third party beneficiaries to assert their proposed contractual rights against the

named defendants, either by state law or by federal provisions of the state plan programs.

After the trial court judgment the petitioners did not utilize administrative appeals, but timely appealed the trial court decision to the Court of Appeals of the State of Kansas. The Court of Appeals with separate comments and also adopting the trial court's findings and conclusions affirmed the trial court's judgment. This respondent did move for modification of those comments and the motion was denied. The petitioners also moved for modification and that motion was denied. The petitioners then petitioned for review by the Supreme Court of the State of Kansas. That court denied the petition and the petitioners have timely filed their petition to this Court.

Argument

The petitioners present no appropriate federal question for review.

The respondents, Secretary of Social and Rehabilitation Services of Kansas and the Personnel Management Chief of the State Department of Social and Rehabilitation Services of Kansas submit that certiorari should not be granted on this matter for the simple reason that the petitioners have never properly presented any substantial federal question which would be appropriate for review.

The petitioners do correctly note that this respondent did request the state court of appeals to modify certain portions of its opinion. To avoid any confusions of an abridged comment, this respondent has

included that full Motion for Modification in Appendix A to this brief.

Even though the considerations of *Seneca Nursing Home v. Kansas State Board of Social Welfare*, 490 F. 2d 1324 (10th Cir., 1974), often cited throughout all stages of this matter, the petitioners' claims for salary changes would not in themselves state a federal question. See also *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1971); *Gully v. First National Bank*, 299 U.S. 109 (1936); and *Utley v. St. Petersburg*, 292 U.S. 106 (1934). So the petitioners would obviously like to demonstrate a conflict between administrative actions in Kansas and rights arising under federal law. The petitioners recite a listing of federal regulations which they assert to have the force and effect of law. Unfortunately their listing and commentary (see P. for Cert., pp. 18, 19 and Ap. G) is cluttered with such irrelevant sections and topics as political expression, right to vote, and layoffs and separations. These distractions may be contrasted with the more interesting omissions.

The petitioners indicate that: "The standards found at 45 C.F.R. Sec. 70.6 and 70.7 (1971) were interpreted by HEW as requiring equal pay for equal work." (P. for Cert., p. 19) Interestingly the petitioners neither support the statement nor actually put it into perspective. We may approach that with several questions. Is "equal pay for equal work" an enforceable right guaranteed by federal law for employees state or federal? Is it a novel question? And has the decision of the state court of appeals radically departed from federal decisions on any substantial federal question?

We may first note that the state court of appeals' opinion states that: "This court on review adopts the findings of fact and conclusions of law as set out in the memorandum decision of the trial court." (P. for Cert., Ap. A, p. 27). The conclusions of law of the trial court specifically rely upon a recent decision of this Court.

> In addition, none of these plaintiffs [petitioners] applied for the higher paying category. It is now clear that one is not entitled to the benefit of a position until he has been duly appointed to it. (*United States v. Testan*, 96 S. Ct. 948) (P. for Cert., Ap. B, p. 37)

Indeed this Court did expressly consider enforcement difficulties of the "equal pay for substantially equal work" principle in its *Testan* opinion:

> We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. §5101, Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified. (424 U.S. 392, at 399)

This decision strongly indicates that the petitioners

present unsubstantial questions. See *California Water Service Co. v. Redding*, 304 U.S. 252 (1938) and *Southpark Square Ltd. v. City of Jackson, Miss.*, 565 F. 2d 338 (1977).

The petitioners present shift of emphasis from statutes to regulation provides no better basis. They still show no effective enforcement provisions even in such regulations. Even the section of the purpose of the regulations limit rather than expand the enforcement powers.

> . . . The federal agencies are interested in the development and continued improvement of State merit systems but exercise no authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems. (45 C.F.R. sec. 70.1 (c) included in P. for Cert., Ap. G, p. 60)

The petitioners may even argue that a nonconformity with the provisions of the system indicates that authorities may be implied. But even such implied authorities would be those of the Secretary of Health, Education, and Welfare. The petitioners show no authority to usurp federal powers and authorities, whether implied or express, through any status of contractual third party beneficiaries. Even the case of *McDonald v. Stockton Met. Transit Dist.*, 36 C.A.3d 436 (1973) indicates that the federal agency rather than the petitioners has the election of remedies. Of course, the petitioners' solution to that problem has been to simply ignore the Secretary of Health, Education, and Welfare and not even make it a party to the action. This has not only thwarted the petitioners' belated attempts to envision some federal question,

but also rendered a shambles of petitioners' supposed request to contractually enforce increased salaries by leaving out the federal agency which is the joint obligor for moneys to pay those salaries under the state plan programs such as those under Social Security Act, Titles I, IV, V, X, XIV, and XIX (of which the Petition for Cert. includes certain sections in its Appendix G). Leaving out the Secretary of Health, Education, and Welfare as a party is also a drastic departure from the *Seneca Nursing Home* case *supra* where that secretary has been a party since the amended complaint filed upon that matter's removal to the federal courts.

The petitioners do make a further attempt to indicate that federal questions must be raised by a strange premise that the state court of appeals' ruling on the question of exhaustion of administrative remedies negated all state grounds. (The argument is found in the Petition for Certiorari, pp. 20-21 and strangely continued in Appendix F, p. 47.) The argument is erroneous from its inception when petitioners state that the "court [of appeals] did not in any manner base its holding upon a failure to exhaust an available administrative remedy." (P. for Cert., p. 21) As already indicated the state court of appeals' opinion expressly adopted the trial court's conclusions of law which included the rulings on available administrative remedies. (See P. for Cert., Ap. A, p. 27 and Ap. B, pp. 35-36, 39) Clearly the petitioners' failings to exhaust administrative remedies are endorsed only by themselves. See *Schulze v. Board of Education*, 221 Kan. 351 (1977), *Gordon v. Horder*, 211 Kan. 611 (1973), and *Thompson v. Amis*, 208 Kan. 658 (1972).

Conclusion

The petitioners have raised no novel questions. Nor have they shown the deprivation of any enforceable right guaranteed by federal law. And they have failed to demonstrate that the state court of appeals has radically departed from any federal decisions, let alone a decision of this Court, on any substantial federal question. For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE A. ROBY
Legal Division
State Department of Social and
Rehabilitation Services
State Office Building
Topeka, Kansas 66612
(913) 296-3967

Counsel for Respondents,
ROBERT C. HARDER, Secretary of
Social and Rehabilitation Services and
W. VAN ALEXANDER, Personnel Chief of
the State Department of Social and
Rehabilitation Services

APPENDIX A

In the Court of Appeals of the State of Kansas

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, individually and on behalf of all persons familiarly situated, *Appellants,*	)	
v.	)	Case
LOWELL LONG, Personnel Director for the State Department of Administration, HENRY SCHWALLER, Secretary of State Department of Administration, ROBERT HARDER, Secretary of State Department of Social and Rehabilitation Services, W. VAN ALEXANDER, Personnel Management Chief, State Department of Social and Rehabilitation Services, and MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS, *Appellees.*	)	No. 49065

Motion for Modification

COMES NOW the Appellee, Secretary of Social and Rehabilitation Services of Kansas and herein urges this Court to modify and correct certain dicta and factual misapprehensions of its opinion entered in the above captioned matter.

It is neither undisputed nor factual that S.R.S. either established nor modified the multiple pay range system before, during, or after 1974 as indicated by the Court in paragraphs 2 and 4 on page 1 of its opinion. As a matter of both fact and statute the adoptions and changes of classifications and pay range assignment were performed by the Finance Council. See e.g. Plaintiffs' Exhibits 4 *et seq.* as attached to

the Deposition of Lowell Long and K.S.A. 75-2938 in its forms prior to 1976.

Further the Court has also made a serious misapprehension of state plan arrangements in the dicta of its sentences on page 3 which state:

> Neither can the Kansas statutes and regulations be held to be a part of the contract between the state and federal governments, because they can be amended without the consent of the federal government. The plaintiffs have cited no cases where state statutes and regulations were held to be part of the contract involving disbursements of federal grant-in-aid funds and simple logic shows the reason for this: either the contract would be subject to unilateral amendment of its terms by the state, or the state would be contractually bound to refrain from exercising its power to amend its own statutes.

First of all the plaintiffs have cited such a case, *Seneca Nursing Home v. Kansas State Bd. of Social Welf.*, 490 F. 2d 1324 (1974) (although it should be re-emphasized, as was previously briefed, that this and other cases do not support plaintiffs' beneficiary status in this matter). Secondly, but more important, the logic recited by the Court in the above quotation is not appropriate. The federal government does allow unilateral amendment by states in its grant-in-aid programs, but it controls those amendments by continually fixing limitations on the latitude of the amendments. See e.g. *Coe v. Hooker*, 406 F. Supp. 1072, 1078-1079 (D.N.H. 1976). In fact it may

easily be judicially noted that the federal government occasionally even requires or encourages state regulation or even statutory changes as a part of its programs. An obvious example is the child support collection statutes needed for Kansas participation in the Title IV D. program, see 42 U.S.C. sec. 602(a)(26), 42 U.S.C. sec. 654 *et seq.*, and Chapter 210 of the 1976 Session Laws of Kansas, K.S.A. 39-709, 753-759.

S.R.S. and its sister welfare agencies of other states face continual litigation on grant-in-aid programs and it is important that such other litigation not be confused by inappropriate dicta even in an unpublished opinion of an appellate court.

Respectfully submitted,

Supreme Court, U. S.
FILED
NOV 17 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-613

LINDA RUTLEDGE, et al,

Petitioners,

v.

LOWELL LONG, PERSONNEL
DIRECTOR FOR THE STATE
DEPARTMENT OF ADMINISTRATION, et al,

Respondents.

RESPONSE TO BRIEF FILED BY RESPONDENTS

JAMES Z. HERNANDEZ
600 Century Plaza Building
Wichita, Kansas, 67202
(316) 263-4958

Attorney for Petitioners

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated,

Petitioners,

v.

LOWELL LONG, PERSONNEL DIRECTOR FOR THE STATE DEPARTMENT OF ADMINISTRATION,

HENRY SCHWALLER, SECRETARY OF STATE DEPARTMENT OF ADMINISTRATION,

ROBERT HARDER, SECRETARY OF STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,

W. VAN ALEXANDER, PERSONNEL CHIEF, STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, and

MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS,

Respondents.

RESPONSE TO BRIEF
FILED BY RESPONDENTS

The Petitioners believe that the Brief by the Respondents requires a short response. Because of erroneous conclusions that might be made on the basis of statements in the Respondents' Brief concerning the allegation that Petitioners had an available administrative remedy, the Petitioners will first turn to that point.

I.

THE PETITIONERS HAD NO AVAILABLE ADMINISTRATIVE REMEDY

The Respondents argue that the Petitioners' claim was denied upon an adequate state ground and rely upon the trial court's holding that the Petitioners failed to avail themselves of appropriate state administrative remedies. However, this ruling cannot bar the Petitioners, as it is clearly erroneous and "without any fair or substantial support". Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 455 (1958); Ward v. Board of County Commissioners, 253 U.S. 17 (1920).

The trial court found that the Petitioners had a statutory remedy under Kan. Stat. Secs. 75-2929 and 75-2940 (1977), which are set forth in their entirety in Appendix A, infra, at 9-10. However, a review of these statutes shows that neither afforded the Petitioners a remedy. Kan. Stat. Sec. 75-2929 simply provides that "(t)he State Civil Service Commission shall hear appeals taken to it pursuant to Sections 75-2940 and 75-2949 . . .". Kan. Stat. Sec. 75-2949, which was not cited by the trial court, allows appeals in cases of dismissal, demotion or suspension of a Civil Service employee and is not, therefore, involved

in this case. Kan. Stat. Sec. 75-2940, which was cited by the trial court, provides, inter alia:

> (1) The director may refuse to examine an applicant, or after examination may refuse to certify an eligible, who is found to lack any of the preliminary requirements established for the examination and for the position or employment for which he or she applies . . . .
> (2) Whenever the director refuses to examine an applicant, or after an examination refuses to certify an eligible, as provided in this section, then the director shall furnish to such applicant a statement of the reasons for such refusal to examine or refusal to certify, as the case may be. In the case of any such refusal an appeal may be taken to the board in accordance with the rules to be adopted in the manner hereinbefore provided. (Emphasis added).

This statute obviously allows appeals in two types of situations, neither of which are involved in this case. First, an appeal can be taken when the Personnel Director of the State Department of Administration refuses to allow an applicant to take a Civil Service examination for a particular Civil Service class; and, second, the statute allows an appeal in the event the Personnel Director refuses to certify a person as being eligible for a position in a Civil Service class after that person has taken the Civil Service examination and been placed on the eligible list for that class. This case neither involves a refusal

to allow any of the Petitioners to take a Civil Service examination for the Social Worker I class, nor the refusal to certify them as eligible for that class. To the contrary, the claims of the Petitioners are grounded upon the fact that they were placed in the proper class, and thereafter denied the benefits of their positions in that class. This was done by designating the Petitioners as Social Worker I-C's while designating others in the same Civil Service class as being Social Worker I-B's. These designations were no more than a means by which to identify and distinguish those such as the Petitioners, who were properly placed in the Social Worker I class, from others who were also properly placed in the same Civil Service class, for the purpose of paying them under different salary ranges. This, of course, was in violation of the Kansas Civil Service Act and regulations and this violation was clearly recognized by the Court of Appeals of the State of Kansas. See Appendix A to the Petition for Writ of Certiorari, at 23, 25. As the Respondent Long clearly stated, these designations constituted no more than a "pay mechanisim" and this fact and the violation resulting therefrom was plainly described in the voluminous testimony given in this case, some of which is set forth in Appendix B, infra, at 11-17.

The trial court also apparently found that a memorandum written by Robert F. Brandt in July of 1970 granted an administrative remedy to the Petitioners. See Appendix B to the Petition for Writ of Certiorari, at 29, 35 and 36. However, in so doing, the trial court did not clearly identify this memorandum, quoted cut of context from the memorandum, and did not mention that another accompanying memorandum

was also written by the Respondent Harder at approximately the same time. Both memoranda are set forth in full in Appendix C, infra, at 18-21. In any event, the trial court's holding, insofar as it is based upon the Brandt memorandum, is again without any fair or substantial support and, therefore, cannot bar the Petitioners. First, these memoranda were no more than an administrative act, which did not grant an appeal authorized by statute or regulation, nor was any remedy whatsoever provided upon taking the purported appeal. Further, the trial court erroneously stated the memoranda provided for appeals to the Kansas Civil Service Commission which is the body that hears and determines Civil Service appeals. However, in point of fact, this was not the case and it is clear from the language of the memoranda that appeals could not have been taken to any state entity empowered by statute or regulation to hear and resolve disputes according to recognized or established procedure. Thus, these memoranda did not make available a remedy of the nature contemplated by the exhaustion doctrine or by the cases relied upon by the Respondents, Gordon v. Harder, 211 Kan. 611, 507 P.2d 341 (1973) and Thompson v. Amis, 208 Kan. 658, 493 P.2d 1259 (1972). In fact, these decisions, by contrast, support the Petitioners' claim that they did not have an available adequate administrative remedy. See also, Rosenfield v. Malcolm, 55 Cal. Rptr. 505, 421 P.2d 697 (S.Ct., 1967).

Second, and just as importantly, when the memoranda are read in their entirety, it is clear that they prohibited rather than allowed a purported appeal of the decision to assign multiple salary ranges to the

Social Worker I Civil Service class. The memorandum written by the Respondent Harder specifically stated that ". . . appeal(s) based upon factors such as recommended salary range, employee qualifications or employee work history will not be considered . . ." and it also stated "(e)mployee appeal will be limited to reason for disagreeing with recommended classification of position." (Emphasis added). The memorandum prepared by Robert F. Brandt, after setting forth areas where no appeal would be allowed, stated that the only appeal which could be taken would be one based upon "allocation of position classification." Thus, the only appeals allowed under the memoranda were ones involving a claim by a Civil Service employee that he was allocated or placed in the wrong class. However, as stated, the basis of the Petitioners' claim is that they were placed in the proper class, but denied the benefits of that class because of the assignment of multiple pay ranges thereto, which was, according to the memoranda, a matter that could not be appealed. Consistent with these memoranda, as well as the appropriate Kansas statutes, employees in the Social Worker I class were told by their superiors that they had no right to appeal the assignment of multiple salary ranges to the Social Worker I class which was the Civil Service class to which they had been properly allocated.

A final important point is that the memoranda and the purported appeal allowed therein were not even applicable to some of the Petitioners such as Linda Rutledge, as the time limit in which their complaint could have been made, as specified in the memoranda had long since lapsed when they were first employed.

The Respondents, in their Briefs filed with the Court of Appeals of the State of Kansas, did not even attempt to point out the administrative remedy claimed to have been available to the Petitioners, notwithstanding the prior decision of the trial court. Likewise, they have not made such a showing to this court. The reason is, of course, that the Petitioners have never had an available administrative remedy and the trial court's ruling to the contrary was without basis in law or fact.

II.

RELIANCE UPON THE TESTAN DECISION BY THE RESPONDENTS IS MISPLACED

The Respondents rely upon United States v. Testan, 424 U.S. 392 (1976) as being supportive of their position. However, Testan, when viewed in the context of this case, is authority that can be relied upon by the Petitioners. In Testan, the Respondents were Federal Civil Service employees seeking to be reclassified to a separate and higher Civil Service class, which is contrary to the situation in the present case. The Testan Respondents also brought a direct action against the United States based upon a theory of Constitution entitlement. However, in this case the Petitioners are relying upon a contract between the United States and the State of Kansas, and in this regard, it should be noted that the Testan court specifically commented that ". . . (t)he respondents do not rest their claims upon contract . . .", 96 S.Ct. at 954. The Testan court also stated ". . . (t)here is no claim here that either respondent has been denied benefit of the position to which he was appointed . . .", 96 S.Ct. at 955. Without question,

the distinguishing factors carefully mentioned by the court in Testan are pivotal to the resolution of this case and, thus, the Petition for Writ of Certiorari should be controlled by the principles previously relied upon by the Petitioners.

III.

CONCLUSION

In this case, there is no question that a substantial, continuing, long-standing violation of the Kansas Civil Service Act and regulations occurred and that the Petitioners were injured as a result of that violation. In fact, the Respondents make no real contention to the contrary. Further, the Respondents do not seriously attempt to respond to the clear evidence showing that Kansas, through its appropriate officials, had knowledge of this violation but took no corrective action. Finally, there is no question that this violation was also a violation of a Federal contractual condition imposed upon Kansas when it accepted Federal funding. Notwithstanding these facts, the Kansas courts have refused to grant the Petitioners either retroactive or prospective relief. However, because of the Federal question involved and the Plaintiffs' standing to present that question, it is respectfully submitted that this court should grant a Writ of Certiorari as requested.

Respectfully submitted,

JAMES Z. HERNANDEZ
600 Century Plaza Bldg.
Wichita, Kansas 67202
Counsel for Petitioners

APPENDIX A

KANSAS STATUTES INVOLVED

Kan.Stat.Sec. 75-2929. Hearing of appeals by commission; rules and regulations.

The state civil service commission shall hear appeals taken to it pursuant to K.S.A. 75-2940 and 75-2949 or any amendments thereto, and shall conduct hearings and pass upon complaints by or against any officer or employee in the classified service for the purpose of demotion, suspension, removal, or dismissal of such officer or employee, in accordance with the provisions of this act and acts amendatory thereof or supplemental thereto. The secretary of administration, with the approval of the state finance council, shall adopt rules and regulations, as provided in K.S.A. 75-3706, relating to the foregoing.

* * * *

Kan.Stat.Sec. 75-2940. Powers of director; exclusion of disqualified persons; appeal.

(1) The director may refuse to examine an applicant, or after examination may refuse to certify an eligible, who is found to lack any of the preliminary requirements established for the examination for the position or employment for which he or she applies; or who is physically so disabled as to be rendered unfit for the proper performance of the duties of the position to which he or she seeks appointment; or who is addicted to habit-forming drugs or is an habitual user of intoxicating liquors to excess; or who has been guilty of any crime involving moral turpitude or of in-

famous or notoriously disgraceful conduct; or who has been dismissed from the public service for delinquency or misconduct; or who has made a false statement of any material fact; or who directly or indirectly shall give, render or pay, or promise to give, render or pay, any money, service, or other valuable thing to any person for, or on account of, or in connection with, his or her test, appointment, or proposed appointment; or who practiced, or attempted to practice, any deception or fraud in the application, in the certificate, in the examination, or in securing eligibility or appointment; or who refuses to furnish testimony as required in K.S.A. 75-2932.

(2) Whenever the director refuses to examine an applicant, or after an examination refuses to certify an eligible, as provided in this section, then the director shall furnish such applicant a statement of the reasons for such refusal to examine or refusal to certify, as the case may be. In the case of any such refusal an appeal may be taken to the board in accordance with the rules to be adopted in the manner hereinbefore provided.

APPENDIX B

The following is taken from the Record on Appeal to the Court of Appeals of the State of Kansas.

The Respondent Long is the Personnel Director for the State of Kansas and, in such position, is responsible for the general administration of the State Civil Service Act and Regulations. He testified as follows:

Q. Is Social Worker I-C, as you used to know them, a position?

A. No.

Q. Is it a class?

A. Social Worker I is a class.

Q. Then I take it Social Worker I-C is not a separate class--let me put it another way. Does the State of Kansas, has it ever had a class under the Civil Service Act for classified employees known as Social Worker I-C?

A. No.

Q. Now, was there a single job description for Social Worker I-C?

A. Try the question again another way. I'm not sure I can answer that.

Q. Was there a job description for Social Workers I-C that pertained only to Social Workers I-C?

A. No, not that I know of.

Q. There was a job description that pertained to Social Workers I, though, was there not?

A. That was a class specification that pertained to Social Worker I, and this would have been supported by individual job descriptions of positions allocated to the class of Social Worker I.

(Vol. II, Rec. on App., Long depo., at 36, line 22--37, line 20.)

* * * *

Q. Now, is--is a Social Worker I-C, does he occupy a position in the class known as Social Worker I?

A. Yes.

Q. And did a Social Worker I-B occupy a position in the class known as Social Worker I?

A. Yes.

Q. And did a Social Worker I-B occupy a position in the class known as Social Worker I?

A. Yes.

(Vol. II, Rec. on App., Long depo., at 210, lines 15-21.)

* * * *

Q. (By Mr. Woodard) Let me ask you, I'll rephrase it. Since you have been in office, what authority are you aware of that would justify the assignment of two salary ranges for the same class?

A. The only authority that I would be familiar with would be the specific action of the State Finance Council authorizing or directing.

Q. Taking into consideration the definition of class, what authority under the regulations, what regulations would authorize it?

MR. PITNER: Same objection.

Q. (By Mr. Woodard) Since you have been in office.

MR. PITNER: I'll object to that as being irrelevant as what was done at the time.

Q. (By Mr. Woodard) Okay. Go ahead.

A. I think if the attorney is going to object--

MR. PITNER: No, go ahead and answer. I'm just saving my objection.

A. I'm not familiar with any.

Q. (By Mr. Woodard) Actually, the same salary range is supposed to be applied to, one salary is supposed to be applied to each class, isn't it, isn't that your understanding?

A. Yes.

(Vol. II, Rec. on App., Long depo. at 52 line 12--53 line 9.)

* * * *

The Respondent VanAlexander is the Personnel Director for the Kansas Department of Social and Rehabilitation Services and, in his position, had the duty of implementing the Kansas Civil Service Act and Regulations within that agency. He testified as follows:

Q. Social Worker I-B and Social Worker I-C or what used to be a Social Worker I-C, those were positions within a class, is that correct?

A. No, the Social Worker I is a classification and Social Worker I-C and I-B had a different salary range assigned within that Social Worker I Class.

Q. Was a Social Worker I-B a separate class?

A. No.

Q. Was a Social Worker I-C a separate class?

A. No.

Q. They were both the same class?

A. Two salary ranges assigned to one class.

(Vol. II, Rec. on App., VanAlexander depo., at 10, line 19--11, line 6.)

* * * *

Q. And so the people in the class are doing, in one class are--strike that. People are assigned to a class based on what they--

what type of work they were doing, right?

A. That's right.

Q. And actually one pay range is supposed to be assigned to a particular class, only one?

A. That's the normal procedure, yes.

Q. Well, that's what the regulations require, isn't it?

A. Yes.

(Vol. II, Rec. on App., VanAlexander depo., at 48, line 25--49, line 10).

* * * *

Herb D. King, during the period in question, was the subordinate of the State Personnel Director who had the initial and primary responsibility for developing Civil Service classes and assigning positions thereto. He testified as follows:

Q. Okay. How do you--let me ask you this. On a day-to-day basis, your section primarily dealt in matters of classification, didn't they?

A. Yes, sir.

Q. Okay. On a daily basis no one in the whole State government dealt more with classification under the Civil Service Act than your section, did it?

A. Would you restate that?

Q. Do you know if any other agency or division of an agency or department in an agency that had to deal with classification under the Civil Service Act and legislation to a greater extent than your section had to? That was the function of your section?

A. That's correct. And when they established new positions or restructured positions we define those positions and designated forms and submitted them to us for a review and for determination as to the most appropriate class.

Q. In your opinion, was it proper and I'm not asking about anything to do with salary ranges, but I want to ask in terms of job duties and responsibilities, in your opinion as the head of that section, was it proper to include a Social Worker I class those persons who were categorized as C's and those persons who were categorized as B's?

A. Is your question was it proper to include the C's in the I-B's?

Q. Into the same class.

MR. PITNER: I'll object. There was not proper foundation laid as to the actual origin of the Federal workers--of the individuals assigned.

Q. (By Mr. Woodard) Okay. You can answer, if you can.

A. Yes, I believe it was proper.

Q. That was in terms of job responsibilities and duties, is that correct?

A. On the basis that from position classification point of view, there was one class--one class only and at that level that describes substantially the same kind of level of work.

Q. Okay. Right. So, from that standpoint--from job duties and responsibilities, this doesn't involve a case of improper classification does it?

A. It wouldn't seem so to me.

Q. The problem is what we're talking about is whether you can apply the salary range?

A. Yes.
(Vol. II. Rec. on App., King depo., at 54, line 15--56, line 8).

* * * *

Q. (By Mr. Woodard) And your opinion, do the Civil Service Regulations require one salary range being assigned to each class?

A. Yes.
(Vol. II, Rec. on App., King depo., at 33, line 24--34, line 2.)

* * * *

APPENDIX C

The following is taken from the Record on Appeal to the Court of Appeals of the State of Kansas.

DATE: July 2, 1970

TO: All Agency and Department Heads

FROM: Robert F. Brandt, Executive Director Department of Administration

SUBJECT: Appeal Procedure for Position Allocations Resulting from Public Administration Service (PAS) Study

The Public Administration Service (PAS) has completed its classification and pay study and the State has received their final recommendations. This notice will set forth the procedure to be followed for all employees desiring to appeal the recommendations of Public Administration Service insofar as position allocation is concerned.

Any classified or classified exempt employee desiring to appeal the allocation of his position should fill out the prescribed form, sample of which is attached, setting forth all the required information indicated as well as his reasons for disagreeing with the proposed allocation of the position. It should be emphasized that this appeal procedure does not concern recommended pay scales or the employee's personal qualifications or work history.

It is not necessary for an appellant to submit copies of his original questionnaire or any correspondence which has been directed in the past to Public Administration Service, as all of this material will be

available to the appeal board for its consideration. Any appeal that is based on factors other than allocation of position to classification will not be considered by the appeal board and will be returned to the originator as disapproved. All appeals should be addressed to the Personnel Director, Department of Administration, 801 Harrison Street, Topeka, Kansas 66612, and the notice Position Allocation Appeal should also be written on the face of the envelope. All appellants will be notified of the Board's decision.

It is anticipated that the appeal board will be appointed by duly authorized state officials in the very near future and will be in session between July 15 and August 15, 1970. Further information concerning this procedure will be issued if necessary.

Copies of this memorandum should be reproduced by all agencies and utmost care should be taken to ensure that all employees have had an opportunity to read its contents.

Thank you.

(Signature)
Robert F. Brandt

(Vol. I, Rec. on App., Affidavit of Lee H. Woodard, at 107).

* * * *

July 9, 1970

To: County Welfare Directors

Re: Appeal Procedure for Position Allocations Resulting from Public Administration Service (PAS) Study

Attached is a copy of a letter from Robert F. Brandt, Executive Director, Department of Administration.

We wish to re-emphasize the following statements in this letter:

1. A copy of the attached letter be made available to each employee.

2. Employee appeal be submitted on a reproduced copy of the attached appeal form.

3. Employee appeal be limited to reasons for disagreeing with recommended classification of the position. An appeal based upon factors such as recommended salary range, employee qualifications, or employee work history will not be considered by the appeal board and will be returned as disapproved.

4. A copy of the original position classification questionnaire which was previously submitted and any other correspondence to Public Administration Service should not be resubmitted. This material will be available to the appeal board.

5. Appeal form should not be mailed later than July 17, 1970.

6. Address appeal envelope as follows:

   Personnel Director
   Department of Administration
   801 Harrison Street
   Topeka, Kansas 66612

Position Allocation Appeal

7. The position classification appeal board will be in session between July 15 and August 15, 1970.

8. The employee appealing will be notified of the decision of the appeal board.

Sincerely yours,

(Signature)

Robert C. Harder
State Director of
Social Welfare

RCH:cad
Attachment

(Vol. I, Rec. on App., Affidavit of Lee H. Woodard, at 107).

AFFIDAVIT OF SERVICE

JAMES Z. HERNANDEZ, being first duly sworn, deposes and states:

That in accordance with Rule 33(2)(e), Supreme Court Rules, he has forwarded three (3) copies of this Response to Brief Filed by Respondents and three (3) copies of this Affidavit of Service to the following:

Mr. Darrell McNeil
Office of the Chief Attorney
Department of Administration of the State of Kansas
Second Floor, Statehouse
Topeka, Kansas 66612

Mr. Curt T. Schneider
Attorney General for the State of Kansas,
and,
Mr. Donald E. Jensen
Assistant Attorney General
Kansas Judicial Center
Topeka, Kansas 66612

Mr. Bruce A. Roby
Legal Division
Department of Social and Rehabilitation Services for the State of Kansas
State Office Building
Topeka, Kansas 66612

James Z. Hernandez

JAMES Z. HERNANDEZ
600 Century Plaza Building
Wichita, Kansas 67202
(316) 263-4958
Attorney for Appellants

Subscribed and Sworn to before me this 16th day of November, 1978.

SAUNDRA J. PARKS
Sedgwick County, Ks.
My Appt. Exp. 9-26-80

Saundra J. Parks

Saundra J. Parks,
Notary Public

My Term Expires:

Sept 26, 1980